FILED
AUG 04 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-545 / 93-0108

IN RE THE MARRIAGE OF BEVERLY ROBIN ROSENFELD AND MARTIN SANFORD ROSENFELD

Upon the Petition of
BEVERLY ROBIN ROSENFELD,

Petitioner-Appellant,

And Concerning
MARTIN SANFORD ROSENFELD,

Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Petitioner-appellant Beverly Robin Rosenfeld appeals a trial court order modifying her dissolution decree to eliminate her alimony award and increase her obligation for child support. We reverse the order modifying and dismiss. **REVERSED AND DISMISSED.**

Bernard L. Spaeth, Jr., and Megan M. Antenucci of Whitfield & Eddy, P.L.C., Des Moines, and Mark McCormick of Belin Harris Lamson McCormick, Des Moines, for appellant.

David S. Wiggins of Wiggins & Anderson, P.C., West Des Moines, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ. Donielson, C.J., and Hayden, J. take no part.

SACKETT, P.J.

Petitioner-appellant Beverly Robin Rosenfeld appeals a trial court order modifying her dissolution decree to eliminate her alimony award and increase her obligation for child support. We reverse the order modifying and dismiss.

The marriage of Beverly and respondent-appellee Martin Sanford Rosenfeld was dissolved in December 1990. Appeal was taken from the decree. This court affirmed the trial court in a three-three decision and, on January 3, 1992, the Iowa Supreme Court declined further review. On February 2, 1992, less than two months after the appeal process was concluded, Martin filed an application seeking a modification of his alimony obligation and an increase in Beverly's child support obligation. The trial court granted him relief on both counts, and this appeal by Beverly follows.

Beverly first contends the trial court should be reversed because in rendering the modification decision it adopted nearly verbatim proposed findings submitted by Martin's attorney. Martin admits the trial court basically adopted his proposed findings. He contends this does not justify reversal as Beverly argues.

Both sides were asked to prepare written findings at the conclusion of the hearing. Therefore, this case is distinguishable from the cases of Production Credit Association of the Midlands v. Shirley, 485 N.W.2d 469

(Iowa 1992), and Kroblin v. RDR Motels, Inc., 347 N.W.2d 430 (Iowa 1984), cited by Beverly in support of her position. In both Production Credit and Kroblin, the trial court requested proposed findings only from one side.

When a trial court adopts nearly verbatim proposed findings supplied by one party, the findings may not be a product of the trial judge's mind. They are, however, his or hers and will not be automatically rejected by this court if they are supported by the evidence. See United States v. El Paso Natural Gas Co., 376 U.S. 651, 656, 84 S. Ct. 1044, 1047, 12 L. Ed. 2d 12, 17 (1964). This is particularly true here where we review in equity and make our own factual determination. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Beverly next contends the trial court should not have eliminated her rehabilitative alimony and Martin failed to meet his burden to show circumstances not in the contemplation of the trial court when the decree was entered.

Both parties hold degrees as medical doctors. Martin is an orthopaedic surgeon and Beverly is a family practitioner. At the time of the dissolution, Martin had

an established and very lucrative practice. Beverly had not been a doctor as long and suffered some problems that had curtailed her successful establishment of a practice. She had also taken some time from the practice for the birth of the couple's two children.

The dissolution court found both parties had substantial earning capacity and Beverly had begun to seriously build her medical practice but for a short period would need financial assistance to enable her to continue to build her practice and attain her full earning potential.

The trial court found Beverly had a gross income in excess of $100,000, would do slightly better in 1990, and fixed her income for child support purposes at $800 a month. The trial court found Martin's adjusted gross income for 1989 to be $563,000. The trial court valued Martin's practice at $700,000 and Beverly's at $70,000.

The trial court then ordered Martin to pay Beverly rehabilitative alimony of $6000 a month from January 1, 1991 through December 31, 1991; $4000 a month from January 1, 1992 through December 31, 1993; and $2000 a month from January 1, 1994 to December 31, 1995.

Beverly testified because of adverse publicity following the dissolution she sold a substantial portion of her practice and entered into a contract to provide emergency room coverage for various Des Moines area hospitals. She needed some retraining to hold the

emergency room position and this was curtailed by a thumb injury for which she subsequently underwent surgery.

At trial, Beverly presented evidence from her accountant that her net income for 1991 with alimony was approximately $60,000 and without alimony approximately $16,508. The accountant presented evidence her net income for 1992 would be about $55,000 with alimony and about $20,000 without alimony.

The modification court found Beverly's earning capacity is substantially higher than the actual income she receives and there is a change of circumstances regarding her potential when compared to her actual income. The court also found Beverly has abandoned her family practice and entered into an emergency room contract and the rehabilitative alimony was for the building of her practice, not the starting of a new one. The modification court then ordered the alimony payments to cease on the first day of May 1992.

Modification of the alimony provisions of a dissolution decree is justified only if there has been some material and substantial change in the circumstances of the parties, financially or otherwise, making it equitable that other terms be imposed. Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa App. 1979). The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. Mears v. Mears, 213 N.W.2d 511, 513 (Iowa 1979); Thayer, 286 N.W.2d at 223.

Circumstances that have changed, to justify modification of alimony, must be those that were not within contemplation of the trial court when the original decree was entered. In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977). Such charges must be more or less permanent or continuous, not temporary. In re Marriage of Carlson, 338 N.W.2d 136, 141 (Iowa 1983).

The knowledge of the trial court at the time the award is made is the basis for determining whether there has been a change of circumstances. Full, 255 N.W.2d at 159; Leo v. Leo, 213 N.W.2d 495, 496 (Iowa 1973). The original decree is entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. Mears, 213 N.W.2d at 514.

At the time of the dissolution, the trial court recognized Beverly's income potential and her need of five years rehabilitative alimony to help her build a practice. She continues to have the income potential but, at the time of the modification hearing, she had not reached her potential. We disagree with the trial court and Martin that by selling a part of her practice and going into emergency room work she should lose her alimony. We find Beverly's current circumstances are those within the contemplation of the trial court when the dissolution decree was entered. See In re Marriage of Van Doren, 474 N.W.2d 583, 586 (Iowa App. 1991). We reverse the trial court's determination alimony should cease as of May 1,

1992, and reinstate the alimony provisions of the original dissolution decree.

Beverly's next complaint is the trial court should not have increased her child support. The trial court ordered, beginning on the 1st day of May, 1992, Beverly should start to pay $1630 a month for child support for the two children based on her take-home earning capacity of $5434 a month.

Beverly contends Martin has not shown a change of circumstances necessary to increase child support.

Martin advances he has and, furthermore, Beverly's income has increased more than ten percent, therefore, Iowa Code section 598.21(9) supports a modification.[1]

The question is whether Martin met the necessary burden of proof for a modification. The trial court based child support not on Beverly's earnings but on her earning capacity. The dissolution court had recognized Beverly

---

1. Iowa Code section 598.21(9) was amended effective July 1, 1991, to provide:

> Notwithstanding subsection 8, a substantial change of circumstances exists when the court order for child support varies by ten percent or more from the amount which would be due pursuant to the most current child support guidelines established pursuant to subsection 4. . . . This basis for modification is applicable to petitions filed on or after July 1, 1992, . . .

The petition here was filed February 1992. New support was established as of May 1992. The hearing was not held until after July 1, 1992. Also see Schuler v. Rodberg, 516 N.W.2d 902 (Iowa 1994), where the court determined section 598.21(9) is a remedial and procedural statute.

needed time to reach her full earning potential and allowed her five years to do so. The fact Beverly would not reach her earning capacity for five years was contemplated by the dissolution court.

In advancing the child support should be increased, Martin has sought to include as Beverly's income both alimony and interest on her property settlement. The dissolution court set these amounts in its decree. The fact Beverly has this additional income does not support a change of circumstance and the income Beverly was earning at the time of the modification hearing was no more than the income the trial court determined would be the income at the time the dissolution decree was entered. We, therefore, find the provisions of sectiton 598.21(9) are not applicable. We agree with Beverly and reverse.

Both parties shall pay his or her own attorney fees on appeal. Court costs on appeal are taxed to Martin.

REVERSED AND DISMISSED.